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An Analysis of Demands for Open Spaces in Maryland Subdivision Regulations

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Comments and Casenotes

AN ANALYSIS OF DEMANDS FOR OPEN SPACES IN MARYLAND SUBDIVISION REGULATIONS

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INTRODUCTION

In assessing the causes of the slum and blighted areas which exist in the United States, it seems clear that a characteristic of the typical slum is its inadequate park and playground space. Experience has shown that once subdivision and development have taken place, it is virtually impossible for the city to provide the needed open space without either demolishing buildings or completely redeveloping an area.[1] In an effort to avoid repeating the mistakes of the past, there has been a considerable increase in the demands placed on subdividers[2] to provide an adequate amount of public open space in new subdivisions.[3]

The purpose of this discussion is not to suggest new demands to be placed on the subdivider but rather to examine the efficacy of the existing requirements for land for parks, schools, and playgrounds. By comparing the current requirements in Maryland with existing authority on the subject,[4] the municipalities of the State can be guided in their effort to create subdivision regulations which will be upheld by the courts, and which, absent any judicial challenge, will not place unconstitutional burdens on the subdivider.

The practical problems faced by "city planners" in Maryland are (1) what administrative steps must be taken in order to exercise legally the authority allowing them to require adequate open spaces in new subdivisions, and (2) having taken the steps required by statute and regulation, what restraints may be imposed by the courts when a

1. Planning Advisory Service, *Public Open Space in Subdivisions,* Information Report No. 46, p. 1 (Jan. 1953).

2. The term "subdivider" really has no meaning today inasmuch as the various processes involved in converting unimproved land into a residential community is done by more than one person. The regulations dealing with park land and school sites are really imposed upon the developer. The term "subdivider" will be used in this discussion, nevertheless, to represent the person or persons who are affected by subdivision regulations dealing with open space. The only exception will be when a different word is specifically used in a regulation.

3. Information on the practice of governmental bodies with respect to requirements made on subdividers for public open space in new developments was first compiled in the work by LAUTNER, SUBDIVISION REGULATIONS: AN ANALYSIS OF LAND SUBDIVISION PRACTICES (1941). An effort to up-date this study was made in Planning Advisory Service, *Public Open Space in Subdivisions,* Information Report No. 46 (Jan. 1953) and Planning Advisory Service, *Public Open Space in Subdivisions,* Information Report No. 46 (Supp. Feb. 1953). See also Note, *Platting, Planning and Protection — A Summary of Subdivision Statutes,* 36 N.Y.U.L. REV. 1205 (1961).

4. There are no reported Maryland cases which have challenge the open space requirements found in the subdivision regulations of the various municipalities.

planning commission places on the subdivider heavy demands for open spaces?

ADMINISTRATIVE STEPS REQUIRED OF THE MUNICIPALITY

Maryland's enabling statute[5] authorizes the incorporated political subdivisions of the state (referred to as municipalities[6]) to regulate, among other things, the size of yards, courts, and other open spaces.[7] To carry out this task, any municipality is empowered to regulate and restrict the use of land.[8] Such regulations shall be made in accordance with a comprehensive plan and shall be designed to promote health and general welfare and to facilitate the adequate provision of schools, parks and other public requirements.[9] Any municipality is authorized to create a planning commission and to carry out a municipal plan.[10] The planning commission will have the duty to make a master plan for the physical development, character and extent of the municipality including the general location of playgrounds, squares, public buildings, parks and other public grounds and open spaces.[11] After the master plan is adopted and duly filed, all new subdivision plats must be submitted for approval to the commission, and no subdivision plat is allowed to be filed or recorded until it has been approved by the commission.[12] Before exercising the authority to pass on subdivision plats, the planning commission must prepare regulations governing the subdivision of land within its jurisdiction.[13] Such regulations may provide for adequate and convenient open spaces for recreation.[14] In Anne Arundel County, the commission may accept a cash payment from the developer in lieu of the actual establishment of land areas by the developer for recreational purposes, and such payments are to be held in escrow and used by that county's legislative body for the purpose of acquiring parks and playgrounds and shall be used for this purpose and no other.[15] Based on the authority granted in the enabling act, fifteen counties have created planning agencies which have in turn enacted subdivision regulations.[16]

The most obvious problem is the fact that not all municipalities of the state have complied with the enabling act. Since the enabling

5. MD. CODE ANN. art. 66B, § 1 (1957). The term "enabling act" has traditionally been used with reference to zoning powers, but the term will be used in this discussion to refer to subdivision control.

6. See definition of "municipality" in MD. CODE ANN. art. 66B, § 10 (Supp. 1964).

7. Rather than an enabling statute, the device used in some states to regulate subdivisions is a statute which requires that all plats be approved by some agency of the state. See Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389, 400 (1953).

8. MD. CODE ANN. art. 66B, § 2 (1957).

9. MD. CODE ANN. art. 66B, § 3 (1957).

10. MD. CODE ANN. art. 66B, § 11 (1957).

11. MD. CODE ANN. art. 66B, § 15 (1957).

12. MD. CODE ANN. art. 66B, § 25 (1957).

13. MD. CODE ANN. art. 66B, § 26 (Supp. 1964).

14. MD. CODE ANN. art. 66B, § 26 (Supp. 1964).

15. MD. CODE ANN. art. 66B, § 26A (Supp. 1964).

16. DIRECTORY OF OFFICIAL LOCAL PLANNING AGENCIES IN MARYLAND (Jan. 1965). The counties with regulations are: Allegany, Anne Arundel, Baltimore, Carroll, Cecil, Harford, Howard, Kent, Montgomery, Prince George's, Queen Anne's, St. Mary's, Talbot, Washington, and Wicomico.

act provides that the authority to pass upon subdivision plats can only rest with local planning commissions created by the municipality, the local legislature is precluded from exercising the authority which it has not delegated to the planning commission.[17] One reason for such strictness is that before a planning commission can refuse approval of a plat it must adopt a master plan and subdivision regulations and before such regulations can be adopted, there must be a public hearing.[18] This procedure affords the developer an element of protection which would be lost if the legislature were able to pass on subdivision plats without being compelled to follow the procedures required of a planning commission. It has also been held that when the power of approval of subdivision plats is granted to the municipalities through a planning commission, failure to create a planning commission is no justification for refusing to approve a plat which conforms to the state enabling act.[19] Even when a local planning commission has been created pursuant to the enabling act, the failure of that body to set forth a master plan and regulations will preclude disapproval of the plat.[20] It is clear that the permissive type of enabling act in Maryland is designed to turn over the task of subdivision control to a municipality-established local planning commission under the standards set out in the enabling statute. This means that those municipalities which do not have a planning commission, a master plan, and subdivision regulations have temporarily forfeited their right to control future subdivisions.

DEMANDS PLACED UPON THE SUBDIVIDER

The remainder of this discussion will consider problems which may arise when a municipality *has* created a planning commission which in turn has developed a master plan and regulations. The focus will be on an analysis of the lines the Maryland courts might draw in delineating the legitimate demands which the municipalities can make as they seek to provide adequate land for parks, playgrounds, and schools. The analysis of municipal subdivision ordinances will be limited to the counties surrounding Baltimore City.[21] This is appropriate because of the increased importance of having valid subdivision regulations in this area due to the reduced amount of remaining open area and increasing population density. It is also predictable that due to the great demand for subdivisions in this area, any test of the regu-

17. See Magnolia Dev. Co. v. Coles, 10 N.J. 223, 89 A.2d 664 (1952); City of Rahway v. Raritan Homes, Inc., 21 N.J. Super. 541, 91 A.2d 409 (1952). *Contra,* Hilbol Realty, Inc. v. Barnhart, 205 Misc. 187, 126 N.Y.S.2d 865 (Sup. Ct. Nassau County 1953).

18. MD. CODE ANN. art. 66B, § 26 (Supp. 1964).

19. People *ex rel.* Jackson & Morris, Inc. v. Smuczynski, 345 Ill. App. 63, 102 N.E.2d 168 (1951); *cf.* People *ex rel.* Tilden v. Massieon, 279 Ill. 312, 116 N.E. 639 (1917).

20. Knutson v. State, 239 Ind. 656, 157 N.E.2d 469 (1959).

21. Due to the lack of undeveloped areas in Baltimore City, there are no requirements placed on a subdivider of land within Baltimore City to set aside open space for parks, schools, or playgrounds. Baltimore Regional Planning Council, *Zoning and Subdivision Laws in the Baltimore Region,* Technical Report No. 8 (Jan. 1963).

lations will arise in this area of the state. The regulations of Anne Arundel County,[22] Baltimore County,[23] Harford County,[24] and Howard

22. The Anne Arundel County Subdivision Regulations state in part as follows:
"Where a proposed park, playground or other recreational area, proposed school site, or other public ground, shown in the adopted park plan, school plan or other adopted part of the master plan of the county, is located in whole or in part within the proposed subdivision, such proposed public ground or park, if not dedicated to public use, or conveyed to the board of county commissioners, or the board of education, shall be reserved for a period of not less than six months from the date of final approval of the final plat by the planning and zoning commission, for acquisition by the county commissioners, board of education or other public agency by purchase or other means." ANNE ARUNDEL COUNTY CODE, § 32-22 (1957).
"Where held appropriate by the planning and zoning commission, open spaces suitably located and of adequate size for parks, playgrounds or other recreational purposes for local or neighborhood use shall be provided for in the design of the proposed subdivision; and, if not dedicated to the public or conveyed to the board of county commissioners, shall be reserved for the common use of all property owners in the proposed subdivision by covenant in the deeds. This shall normally be considered to be about five per cent of the gross area of the subdivision. Streams, lakes and other watercourse areas may be considered as part of the five per cent." ANNE ARUNDEL COUNTY CODE, § 32-23 (1957).
The state statute cites Anne Arundel County as the only municipality which has the right to accept a cash payment from the developer in lieu of the actual establishment of land areas for recreation purposes. MD. CODE ANN. art. 66B, § 26A (Supp. 1964).

23. The Baltimore County Subdivision Regulations state in part as follows:
"No preliminary plan for the proposed development of land for residential purposes in Baltimore County shall be approved by the planning board unless such plan provides for local open space tracts. . . .
* * * * * *
Local open space tracts, at the option of the developer, may be retained permanently by him, or deeded by him to the county. When such tracts are retained by the developer, plans for improvement and maintenance of these tracts must be approved by the board of recreation and parks, and suitable deed covenants made to assure both continuing use of the tracts for local open space purposes and proper operation and maintenance of the same to said board's satisfaction.
* * * * * *
As an alternative, the developer, at his option, may deed a local open space tract to the county.
* * * * * *
Nothing herein contained shall be construed to modify or limit the provisions of Sec. 23.17 of the 1962 Cumulative Supplement to the Baltimore County Code, 1958. . . ." BALTO. COUNTY CODE, § 44-2 (1958), as amended, Bill No. 68, Legislative Session 1963, Legislative Day No. 11 (to take effect Sept. 26, 1963).
The Baltimore County Planning Commission drafted new Subdivision Regulations on Feb. 26, 1965, which should become effective in the near future. The provisions quoted above remain the same in the proposed draft. Sec. 23.17 of the BALTIMORE COUNTY CODE (Supp. 1962), provides that if a proposed subdivision plan conflicts with any proposal in the master plan for any school, park, playground or any other public improvement or facility, the planning commission may reserve any portion or all of the land involved for no longer than eighteen months from the date of the original application for approval of the preliminary subdivision plan. If at the end of the reservation period, the land so reserved is not acquired for public use or if condemnation proceedings have not been instituted, the reservation will be void.

24. Harford County's subdivision Regulations state in part as follows:
"Due consideration shall be given to the allocation of areas suitably located and of adequate size for playgrounds, playfields, schools or parks, for local or neighborhood use. Such areas may be offered to the Board of County Commissions or other Public Agency, or reserved for common use of all the property owners within the proposed subdivision, by deed covenants, or may be reserved for acquisition at the option of the County Commissioners, within a period of one hundred twenty (120) days, by purchase or other means. The Master Plan of Harford County shall also be consulted to determine whether any proposed public

County,[25] will be considered to determine exactly what requirements currently might be placed on the subdivider and what is the legal foundation on which the regulations rest. The regulations include such demands as "dedicate," "offer for conveyance," "reserve for acquisition by the municipality," "reserve land for common use by deed covenant," and the payment of a fee for future acquisition of parks or playgrounds.

1. *Dedicate*

The question of the legality of the requirement to *dedicate* land might arise in Anne Arundel County or Baltimore County. In the Anne Arundel Regulations, the word "dedicated" is used as an alternative method by which the county may provide for open spaces.[26] The Baltimore County Regulations state that open space tracts may be deeded to the county.[27] A consideration of the requirement on the subdivider to dedicate land for public open spaces must be divided into the question of authority and the question of constitutionality.

a. Authority

The first question is whether a municipality in Maryland has the authority to require dedication of land as a condition precedent to plat

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grounds are shown within the Subdivision, and in this event the land shall be reserved for one hundred twenty (120) days for acquisition by the County Commissioners by purchase or other means.

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In determining such areas for conveyance or reservation, however, the Commission shall take into consideration the prospective character of the development — whether dense residential, open residential, business or industrial. The Commission shall waive the provisions for open spaces or public sites where they would cause undue hardship or where there exists adequate open space to serve the population in the area platted. Due regard shall be shown for preserving outstanding natural scenic areas and historic sites or structures. No land shall be taken under this section by the County or any Public Agency without the payment of just compensation." Subdivision Regulations: Harford County, Maryland, § IV: 4.26 (adopted March 10, 1959 and revised Aug. 1, 1961).

25. Howard County Subdivision Regulations state in part as follows:

"Due consideration shall be given to the allocation of areas suitably located and of adequate size for playgrounds, playfields, schools and parks for local or neighborhood use, to be offered for conveyance to the Board of County Commissioners or reserved for common use of all property owners within the proposed subdivision by deed covenants, or reserved for acquisition at the option of the County Commissioners within a period of five years by purchase or other means.

In determining such areas for conveyance or reservation, however, the Commission shall take into consideration the prospective character of the development — whether dense residential, open residential, business, or industrial. The Commission may reduce or waive the provision of open spaces and sites in situations where they would cause undue hardship or where there exists adequate open space to serve the population in the area to be platted. Where a subdivided area is too small to provide an open space of suitable size and character, the Commission may specify provision of such a tract as may be combined with open spaces provided or to be provided in adjoining area, so as to produce a total area of adequate size. Due regard shall be shown for preserving outstanding natural or cultural features such as scenic spots or water-courses, exceptionally fine groves of trees, and historic sites or structures. Provision for public ownership is usually the best means of assuring their preservation." Howard County Planning Commission, *Howard County Subdivision Regulations,* Howard County, Maryland, p. 12 (March 7, 1961).

26. See regulations cited note 22 *supra.*

27. See regulations cited note 23 *supra.*

approval. The Maryland statute neither expressly authorizes nor forbids a municipality to require park land dedication.[28]

A similar question arose in a Puerto Rican case, *Pizarro v. Planning Board*,[29] which involved an enabling statute that gave the local planning board authority to adopt regulations for "obligatory reservation" of park area as a condition to plat approval. The court held that the local regulation requiring that park land be "reserved and dedicated" was not authorized by the statute, nor did the statute authorize a regulation requiring a *transfer* of land to the municipality without compensation to the subdivider, but only authorized a regulation requiring that land in the platted area be *reserved* for parks.

The opposite conclusion was reached in a New York case, *In re Lake Secor Development Co.*[30] The relevant language in the enabling statute required that before approval by the planning board, a plat would, in appropriate cases, need to ". . . show a park or parks suitably located for playgrounds or other recreation purposes."[31] The enabling act also said that in approving such plats, the planning board ". . . shall require . . . that the parks shall be of reasonable size for neighborhood playgrounds or other recreation uses."[32] The court held that a planning board may refuse to approve a plat upon which a subdivider failed to *dedicate* to public use sufficient land for parks even though the word "dedicate" was not found in the statute. The court looked at the purpose of the statute and other statutes pertaining to the planning board and determined that, construed together, the board was authorized to determine the area on the plat to be used for parks, and to require its dedication by the subdivider.

If a local planning commission in Maryland were to require a subdivider to dedicate park land as a condition to plat approval, it is predictable that the Maryland courts would declare such a demand outside the authority granted to the county by the enabling act which only states that the subdivision regulations ". . . may *provide* . . . for adequate and convenient open spaces for . . . recreation. . . ."[33] It should be noted also that pursuant to Art. 66B, Sec. 19, the planning commission of a municipality has the power to purchase or condemn land for parks, grounds, or spaces. It can be argued that to list these alternatives is to exclude the right to demand dedication to the public. By taking this approach, the court would avoid the question of the constitutionality of a demand for the dedication of land to the municipality without compensation as a condition precedent to plat approval.[34]

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28. MD. CODE ANN. art. 66B (1957).
29. 69 P.R.R. 27 (1948).
30. 141 Misc. 913, 252 N.Y. Supp. 809 (Sup. Ct. 1931).
31. N.Y. TOWN LAW § 149-n, as amended, N.Y. TOWN LAW § 277 (Supp. 1964), cited in *In re* Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y. Supp. 809, 811 (Sup. Ct. 1931).
32. *Ibid.*
33. MD. CODE ANN. art. 66B, § 26 (Supp. 1964). [Emphasis added.]
34. In most of the cases which have faced ordinances which require land dedications or the payment of fees for school and park purposes, the courts have avoided the constitutional question by finding that the exactions are not authorized by the applicable enabling act. See Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1134 (1964).

b. Constitutionality

Assuming that Maryland's enabling act would be construed in such a way as to authorize municipalities to require dedication of land for public open space, the courts would then be faced with the constitutional issue of whether the required dedication amounts to a taking of private property for public use without just compensation.[35]

In *Pioneer Trust and Savings Bank v. Village of Mount Prospect*,[36] the Illinois court adopted the following rule:

> If the requirement [of dedication] is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.[37]

The planning commission of Mount Prospect did not sustain the heavy burden of proving that the requirement of dedication of land for educational and recreational facilities which it sought to impose on the subdivider was specifically and uniquely attributable to his activity. The record merely contained an agreed statement of facts which showed that the then existing school facilities of Mount Prospect were near capacity. The court concluded that the situation was the result of the total development of the community and that if the whole community had not developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present. The court did not state what it might have held had there been sufficient proof to the effect that the need for recreational and educational facilities was one that was specifically and uniquely attributable to the proposed subdivision.

The recent Montana case of *Billings Properties, Inc. v. Yellowstone County*[38] met the constitutional question head on. Under the facts of the case, the court concluded that the requirement that a subdivider dedicate a portion of his land for parks and playgrounds as a condition precedent to approval of the plat is not an unreasonable exercise of the police power. The court went on to assert the same rule that was applied in *Pioneer* and drew the implication from the *Pioneer* opinion that if the record in that case had shown that the need for additional recreational and educational facilities was created by the subdivision, then the requirements for land dedication would not have been considered an unreasonable burden. The Montana statute states that when the area to be subdivided is over twenty acres, at least one-ninth of the platted area must be dedicated unless the municipality, for good cause shown, reduces the amount to one-twelfth.[39] On the strength

35. MD. CONST. art. I, § 40, states that the General Assembly shall enact no law authorizing private property to be taken for public use without just compensation.
36. 22 Ill. 2d 375, 176 N.E.2d 799 (1961); 50 ILL. B.J. 626 (1962).
37. *Id.* at 802.
38. 394 P.2d 182 (Mont. 1964).
39. MONT. REV. CODE § 11-602 (1947).

of that statute, the court concluded that the question of whether a subdivision of twenty acres specifically and uniquely created the need for a park had been answered by the state legislature. Based on this analysis, the court concluded that the legislature determined that the need for a park was not merely concomitant to the natural growth of the municipality. The court stated that such a determination is within the province of the Legislature and will not be disturbed unless there is a preponderance of evidence against it. The *Billings* case, therefore, shifted the burden of proof to the subdivider who must prove that his subdivision is not specifically and uniquely responsible for the need for land for parks and playgrounds. The burden is made the more difficult due to the presumptive validity of legislation.

In attempting to predict what type of statutory language would be required in Maryland to get the result in *Billings*, it is important to note the emphasis the court placed on the wording of the statute. The court stated that the statute is a legislative determination that subdivisions of twenty acres or more needed a park or parks. If such a decision is left to the municipalities, as is the present situation in Maryland, a different result is indicated.

> If the Legislature had felt that such parks were needed merely because of the growth of the municipality, it would not have made the requirement that land be dedicated for parks in subdivisions of this size absolute, but would have made the requirement similar to the one for subdivisions under ten acres, that is, leaving it to the discretion of one of the boards mentioned in the statute.[40]

On the strength of this authority, it would seem that the Anne Arundel and Baltimore County regulations which call for dedication and the deeding of land, respectively, are invalid. In order for the municipalities of Maryland to be able to make such requirements for land for park or playground purposes, *Billings* suggests a basic change in the present statutory scheme. The state enabling act would have to contain language to the effect that subdivisions of a certain size do in fact create the need for parks and playgrounds and the state statute would have to require that there must be dedication of a certain amount of land to satisfy the need. Once the basic policy is determined by the legislature, then it would seem that the local planning commission could only exercise its discretion by reducing the requirements within established standards. To allow the planning commission complete freedom to enforce the statute or to excuse the subdivider from the requirement to dedicate land would seem to be an invalid delegation of legislative power. It is clear that such a statutory scheme would divest the local planning commissions of the discretion they now exercise by requiring dedication of land in specified instances regardless of the particular needs of the subdivision.

The *Billings* case considered only the requirement of dedication of land for park and playground use. It did not have to decide whether the state's police power is broad enough to encompass a requirement for the dedication of land for schools. This is still an open question.

40. Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 188 (Mont. 1964).

It has been argued that any exaction must fulfill two requirements: (1) the improvement financed by the subdivider must inure directly to the homeowners in the subdivision itself, and to the extent that they benefit outsiders, compensation must be paid;[41] and (2) the improvement must be one for which the municipality could ordinarily levy special assessments.[42] Such an analysis would lead to a distinction between streets, sewers, and neighborhood parks on the one hand and school buildings, police and fire stations on the other.[43] The former are seen to be valid and the latter unconstitutional.

A more liberal approach[44] would stress the fact that the constitutional test of legislation is not whether the courts approve the wisdom of a policy but rather whether it is a reasonable exercise of the state's police power. It can be argued that it is far from arbitrary and unreasonable for a legislature to subject new residents to increased municipal costs attributable to their presence by the technique of imposing costly requirements on the subdivider. The reasonableness of such a policy is seen in the fact that it seeks to protect older residents from tax increases and provides another source of municipal revenue. It is also questioned whether there is really a constitutional dividing line between statutes which permit one kind of cost to be imposed (for instance, street improvements) and not another (for instance, educational facilities) as long as a method exists for relating the costs which are sought to be passed on and the actual demands made on the subdivider.[45]

Of the municipalities being considered, Harford and Howard counties may require the subdivider to furnish land for school sites. Even if a requirement for land for school purposes were held to be constitutional, the municipality would have to weigh the desire to save itself certain expenses against various other policy considerations. The cost of such land would, of course, be passed on to the prospective residents of the subdivision. If the cost of the new homes is disproportionately high, the lots will not be sold. This could result in a loss of income taxes from an insolvent subdivider as well as the loss of future property taxes. There is also the argument that when the government forces up the cost of homes in certain areas, it is indirectly making the subdivision less accessible to minority groups with only

41. See Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 407–09 (1963); Schmandt, *Municipal Control of Urban Expansion*, 29 FORDHAM L. REV. 637, 650 (1961); Comment, 1961 WIS. L. REV. 310, 320–23 (1961).

42. Reps & Smith, *supra* note 41, at 409–10.

43. See 14 MCQUILLEN, MUNICIPAL CORPORATIONS § 38.11 (3d ed. 1950).

44. See Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

45. This theory seems to have no support in case law. See Township of Springfield v. Bensley, 19 N.J. Super. 147, 158, 88 A.2d 271 (Ch. 1952), which held that a municipality has no right to refuse to grant approval for a building project merely because its school system would be unable to absorb the increase of students or would increase taxes. See also Midtown Properties, Inc. v. Madison Township, 68 N.J. Super. 197, 172 A.2d 40 (Super. Law Div. 1961), where the court said by dictum that any attempt to compel a developer to pay for building a school, or to donate land for a school, as a condition precedent to giving approval to a subdivision violates the subdivider's constitutional rights.

moderate income who might otherwise be able to afford the homes were the cost based solely on demand and the quality of the product. The result would be to preclude certain people from living where they otherwise might if certain costs were absorbed by all the residents of the municipality.[46]

2. *Offer for Conveyance*

a. Parks and Playgrounds

A technique being used by three of the municipalities to insure the preservation of open space requires that open space may be *offered for conveyance* to the county. This could mean either that land is to be offered for sale or that the municipality will take under the power of eminent domain. If the subdivider is able to bargain freely for a reasonable price, under the first possibility, there would not be any problem.

Failing to agree on a price, it would seem that the municipality could take by eminent domain under this provision. The traditional problems encountered when trying to exercise the power of eminent domain are: the taking must be for a public purpose, there must be a necessity, and there must be just compensation made to the owner of the property taken.[47] Maryland has specifically provided that the acquisition of interest in real property for the preservation of *open spaces and areas* constitutes a public purpose for which public funds may be expended or advanced.[48] Any county or city may acquire the fee or any lesser interest to achieve this end.[49] "Open space" or "open area" is defined in the statute as "any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources."[50] The question of whether a public purpose is in fact being served is for judicial determination; yet there is good reason to believe that preservation of open space is for a public purpose.[51] This is especially true in Maryland on the strength of the above statute.[52]

46. The force of these arguments is played down in Heyman & Gilhool, *supra* note 44, at 1155–57, where the emphasis is on methods of relieving the financial pressures on municipalities and not on the dangers of governmental racial discrimination resulting from governmentally-compelled increased costs for housing. The authors state at page 1155:

> "Subdivision housing is by its nature exclusionary. Many communities are made up primarily of houses in price ranges in excess of the financial capabilities of a large proportion of the population. Income level exclusion (and to a large extent concomitant racial exclusion) has already occurred, and modest additional price increments are inconsequential."

These observations fail to distinguish the vital difference between high costs prompted by the elements of a competitive market and high costs generated by governmental requirements.

47. Boom Co. v. Patterson, 98 U.S. 403 (1878).

48. MD. CODE ANN. art. 66C, § 357A(a) (Supp. 1964).

49. MD. CODE ANN. art. 66C, § 357A(a) (Supp. 1964).

50. MD. CODE ANN. art. 66C, § 357A(b) (Supp. 1964).

51. See Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939). See also Note, 75 HARV. L. REV. 1622, 1631–35 (1962).

52. MD. CODE ANN. art. 66C, § 357A(a) (Supp. 1964).

b. Future School Sites

It should be noted that schools do not seem to be included in the definition of "open spaces" or "open areas" in the Maryland statute,[53] inasmuch as the condemnation is not being made with the purpose of retaining the existing openness, natural condition, or present state of use. Instead, the condemnation is being made to provide ground for the construction of a school.

Another problem may arise if the taking by eminent domain is for *future school sites.* In *Board of Education of the City of Grand Rapids v. Baczewski,*[54] a taking was invalidated when there was no present intention of building a school. In that case, the court had to interpret the Michigan constitutional provision that there must be a necessity for using such property.[55] The court stated that there must be proof that the property will either be immediately used for the purpose for which it is sought to be condemned or within a period that the jury determines to be the near future or a reasonably immediate use.[56] The court had little trouble deciding that where the property to be condemned would not actually be used for a school site for thirty years and the purpose of acquiring the land now was in order to save money in the future, the requirement of necessity was not met.

While a delay of thirty years would not satisfy the criterion of necessity, the right to condemn for future highway construction has been upheld.[57] The Maryland court will not review a decision that it is necessary to acquire property in order to build a road unless there is a showing that the decision is oppressive, arbitrary, or unreasonable.[58] It may be that an important factor in such judicial review is whether there is a reasonably definite plan for future construction.[59]

It would seem reasonable to assume that the same standards as to necessity that are applied in highway condemnation cases will be used in judging the necessity of condemning land for future school sites. This would indicate that the Maryland courts will be sympathetic with a decision that it is necessary to condemn land for a future school site when there is a reasonably definite plan for future construction and there is no showing of bad faith.

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53. MD. CODE ANN. art. 66C, § 357A(b) (Supp. 1964).

54. 340 Mich. 265, 65 N.W.2d 810 (1954); 18 U. DET. L.J. 333 (1955).

55. MICH. CONST. art. 13, § 2 (1908). This provision has been omitted from the Michigan Constitution of 1963; yet it would seem that the requirement of necessity is still applicable.

56. *Accord,* Kern County Union High School District v. McDonald, 180 Cal. 7, 179 Pac. 180 (1919); City of New Orleans v. Moeglich, 169 La. 1111, 126 So. 675 (1930); and State *ex rel.* City of Duluth v. Duluth Street Ry. Co., 179 Minn. 548, 229 N.W. 883 (1930).

57. See Clendaniel v. Conrad, 3 Boyce (Del.) 549, 83 Atl. 1036 (1912); Pittsburgh Junction R. Co.'s Appeal, 122 Pa. 511, 6 Atl. 564 (1886); Vermont Hydro-Electric Corp. v. Dunn, 95 Vt. 144, 112 Atl. 223 (1921).

58. State Roads Comm'n v. Franklin, 201 Md. 549, 95 A.2d 99 (1953). Taking for future use was also approved in State Road Dep't v. Southland, Inc., 177 So. 2d 512 (Fla. Dist. Ct. App. 1960); Woodlawn v. Arkansas State Highway Comm'n, 220 Ark. 731, 249 S.W.2d 564 (1952); but was disapproved in State *ex rel.* Sharp v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955).

59. See generally, Helstad, *Recent Trends in Highway Condemnation Law,* 1964 WASH. U.L.Q. 58, 61 (1964).

3. *Reservation of Land*

With the exception of Anne Arundel County, there are provisions which call for the subdivider to *reserve* certain lands for acquisition within a specified length of time. Howard County specifies that the municipality must exercise its option to acquire the land within five years. Baltimore County allows 18 months, and Harford County allows itself only 120 days. The inevitable question is how long can a subdivider be compelled to hold in reserve land designated for a public purpose. The Supreme Court of Puerto Rico has held that immediate action to acquire title was not necessary.[60] The opposite conclusion was reached when the Pennsylvania court looked at a state statute which allows a local government three years to acquire land which had been planned as a park. The court held the statute unconstitutional and stated as follows:

> The injustice to property owners of permitting a municipal body to tie up an owner's property for three years must be apparent to everyone. The city can change its mind or abandon or refuse to take the property at the end of three years; but in the meantime the owner has been, to all intents and purposes, deprived of his property and its use and the land is practically unsalable.
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> The action of the City of Beaver Falls in plotting this ground for a park or playground and freezing it for three years is, in reality, a taking of property by possibility, contingency, blockade and subterfuge, in violation of the clear mandate of our Constitution that property cannot be taken or injured or applied to public use without just compensation having been first made and secured.[61]

It would seem that a required reservation of park land in new subdivisions for an indefinite period is of doubtful validity; yet a requirement to reserve such land for a specified and relatively brief period of time might be sustained.[62] More specifically, it would seem that five years is an unreasonable amount of time to give the municipality to exercise its option to acquire land in a subdivision. A reasonable length of time should reflect the reasonable time required for a municipality to decide to acquire land, to raise the money, and to complete the transaction. The 120 days allowed in Harford County is more than reasonable inasmuch as the delay of a municipality in raising money can be considerable. It would seem that the purpose of reserving land is to give a municipality time to consider the future needs in a proposed subdivision and to acquire the land at a far cheaper price than it would if it waited and would only acquire by eminent domain. A period of

60. Segarra v. Puerto Rico Planning Bd., 71 P.R.R. 139 (1950).

61. Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34, 36-7 (1951).

62. See Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 CORNELL L.Q. 258, 274 (1955). See also Fry, *Subdivision Control and Planning*, U. ILL. L.F. 411, 439 (1961).

one and one-half years would satisfy these requirements and at the same time minimize grounds for constitutional attack.[63]

A Maryland statute gives indirect support to this conclusion.[64] This state has been one of the leaders in legislating a technique whereby the municipality can compensate an owner whose land is to be reserved for a period longer than would seem reasonable.[65] A municipality may purchase a "development right easement" which serves to compensate the subdivider for any losses which he sustains by reason of his inability to develop the land for a given period of time.[66] This possibility is an alternative to reserving land for long periods of time and would seem to emphasize the idea that the time allowed for reservation relates to the time needed by a municipality to decide whether to acquire the land and to make the purchase.

4. *Reserve Land for Common Use by Deed Covenant*

Another requirement found in all of the subdivision regulations being considered requires a subdivider to *reserve land for the common use of all the property owners within the proposed subdivision by deed covenants.* This requirement would seem to have the same practical effect as the requirement to dedicate land to the municipality in that under either scheme the owner has no control over his property.[67] The subdivider is required to turn over a portion of his land to public use without receiving any direct compensation. This being true, such a requirement should be judged by the same constitutional standards that are applied to dedication.

5. *Payment of Fees*

The only remaining requirement to be considered is the cash payment in lieu of land. A consideration of this exaction must be divided into the question of authority to make such a demand, and, secondly, the constitutionality once the authority is granted.

a. Authority

The statutory authority to demand fees from subdividers to be held in escrow for the future acquisition of parks and playgrounds is clearly established in the case of Anne Arundel County.[68] Authority

63. See Reps & Smith, *Control of Urban Land Subdivisions,* 14 SYRACUSE L. REV. 405, 422–23 (1963).

64. MD. CODE ANN. art. 66C, § 357A (Supp. 1964).

65. See Note, 75 HARV. L. REV. 1622, 1635–37 (1962).

66. MD. CODE ANN. art. 66C § 357A (Supp. 1964).

67. See Reps, *supra* note 62, at 271. *Cf.* Pizarro v. Puerto Rico Planning Bd., 69 P.R.R. 27, 35 (1948), where the court distinguished between the reservation and the transfer of land.

68. "In Anne Arundel County, the commission may accept a cash payment from the developer in lieu of the actual establishment of land areas by the developer for recreational purposes, and such payments shall be held in escrow and used by the council for the purpose of acquiring parks and playgrounds and shall be used for this purpose and no other." MD. CODE ANN. art. 66B, § 26A (Supp. 1964).

for other municipalities to make similar demands in their regulations seems highly doubtful so long as such authority is not specifically granted in the enabling statutes.[69]

b. Constitutionality

Granting that statutory authority exists for Anne Arundel County to demand cash payments in lieu of land, it would seem that the statute could be attacked on the grounds of inadequate standards. A portion of the New York Town Law[70] which is similar to the Maryland statute was held invalid for that reason.[71] In particular, it was held that the statute failed to set standards as to the amount of the fees which can be required or standards determining whether a fee is to be required at all. The same weaknesses are apparent in the Maryland statute. Another similarity is the absence of a standard as to use of the cash contribution, and this is a constitutional question.

If it is assumed that the problems of authorization and adequate standards can be overcome, such a provision faces the same constitutional obstacles that are asserted against the demand for the dedication of land.[72] The objection is that in both instances the exaction will be used by the general community rather than for the exclusive benefit of the subdivider. Although no cases seem to turn on this consideration, there are considerable dicta to the effect that fees can not be required where the purpose is to help the entire city meet its future needs for park and school sites and the fund raising method does not relate to the needs of the particular subdivision.[73]

While this high standard of constitutionality is applied both to the demands for land for park, playground, or school purposes, and to fees in substitution thereof, the same does not seem to be true where fees are substituted for requirements which have long received approval by the courts such as installation of sewerage facilities.[74]

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69. See Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962); Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961).

70. "If the planning board determines that a suitable park or parks of adequate size cannot be properly located in any such plat or is otherwise not practical, the board may require as a condition to approval of any such plat a payment to the town of an amount to be determined by the town board, which amount shall be available for the use by the town for neighborhood park, playground or recreational purposes including the acquisition of property." N.Y. TOWN LAW, § 277 (Supp. 1964).

71. Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960).

72. See Taylor, *Current Problems in California Subdivision Control,* 13 HASTINGS L.J. 344, 354 (1962).

73. See Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960); Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961).

74. Cash fees have been held valid when they are designed to offset the total cost of providing new sewerage facilities for all the prospective subdivisions in the area, Stanco v. Suozzi, 11 Misc. 2d 784, 171 N.Y.S.2d 997 (Sup. Ct. 1958); and when a fee was for the cost of connecting with and the use of sewers even though the benefit to the subdivider from the money paid into the fund could not be specifically pointed out, Longridge Estates v. City of Los Angeles, 6 Cal. 900, 183 Cal. App. 2d 533 (Dist. Ct. App. 1960). *Contra,* City of Buena Park v. Boyar, 8 Cal. 674, 186 Cal.

There are two situations wherein Anne Arundel County is specifically authorized to accept a cash payment from the developer or contractor. One instance is where the payment is in lieu of construction and installation of improvements or utilities,[75] and the other is where the payment is in lieu of the actual establishment of land areas for recreational purposes.[76] It would seem that in the first situation, the provision will be upheld because it is a substitute for exactions which have long been approved and the questions of direct, exclusive, and immediate benefit to the subdivision in question will not be relevant. In the second situation, however, such questions are relevant and seem to apply both to the requirement of land itself and to the use of the cash payment which may be substituted for the demand for land.

In view of the foregoing discussion, several suggestions can be made so as to better insure that the requirement of cash payments in lieu of land will be upheld. Both the enabling act and the municipality's regulations should expressly authorize the payment of fees; and both should set out standards as to the amount which can be demanded, whether a cash payment is to be required at all, and some specific language to the effect that the land will be used for the direct, immediate and exclusive benefit of the subdivision which is being charged.

SUMMARY

(1) Without creating a planning commission which develops a master plan and subdivision regulations as provided in MD. CODE ANN. art. 66B (1957), a municipality has no authority to regulate future subdivisions. As of January, 1965, there were eight counties in this position.

(2) The requirement of dedication of land found in the Anne Arundel and the Baltimore County regulations would probably be held invalid on the ground that no authority for such an exaction can be found in the state enabling statute. Such a result would avoid the constitutional question of whether there has been a taking without just compensation.

(3) Assuming the requirement of dedication of land is held to be authorized based on the current enabling act, or assuming an enabling act specifically allowing the requirement of dedication, the constitutional question will have to be faced. The Anne Arundel requirement of dedication and the Baltimore County requirement for land to be deeded to the county are seen to be invalid on constitutional grounds.

(4) The only case which has sustained the requirement of dedication of land for park and playground use is the Montana case of *Billings Properties, Inc. v. Yellowstone County*. In order for the Maryland law to conform to the provisions found valid in Montana, there would have to be a specific provision in the enabling act which would divest the local planning commission of much of the flexibility which it now enjoys.

App. 2d 61 (Dist. Ct. App. 1960), where the court pointed out that the cash payment required would be used to build a particular drainage ditch which was undoubtedly for the direct benefit of the subdivision in question when considered in relation to it and the adjoining area.

75. MD. CODE ANN. art. 66B, § 26 (Supp. 1964).

76. MD. CODE ANN. art. 66B, § 26A (Supp. 1964).

(5) Even if the Maryland statute conformed with the scheme suggested in *Billings,* the constitutionality of a requirement for the dedication of land to be used for school sites would still be open to doubt. Based on current judicial thinking, such an exaction would probably be held unconstitutional. But even if the requirement were considered valid, it is suggested that policy reasons outweigh the possible economic advantage of passing educational costs along to the residents of a new subdivision.

(6) The requirement to "offer for conveyance" is clearly valid if it means a sale following a genuine bargain over price. If it means a taking by eminent domain, then such a taking as applies to parks and playgrounds would be for a public purpose and presumably for just compensation and therefore valid. A taking of land for a future school site would be of doubtful validity under the present statute.

(7) The possible invalidity of eminent domain for future school sites would seem to be solved if two steps are taken:

(a) MD. CODE ANN. art. 66C, sec. 357A(b) (Supp. 1964) should be reworded so that it no longer implies that school sites are excluded from its coverage.

(b) The condemnation of land for future school sites is part of a reasonably definite plan for future construction.

(8) The reservation of land for possible acquisition by the municipality is a justifiable demand so long as the duration of reservation is related to the reasonable time required for a municipality to reach a decision as to whether to buy the land, to raise the money, and to conclude the transaction. The period of five years required by Howard County would seem to be unreasonably long. A year and one-half would have a better chance of being sustained.

(9) The requirement to reserve land for the common use by deed covenant would seem to face the same constitutional obstacles as the demand for dedication. This is an area where the planning commission can effectively point out to the subdivider the fact that adequate and convenient open space in a subdivision is not a burden upon him, but, on the contrary, will appreciably raise the value of every lot and the subdivision as a whole. The argument of self-interest should not be overlooked by a municipality when it seeks to accomplish by persuasion what it might not be able to demand by regulation.

(10) Even when authority exists to demand cash payments, there must be adequate standards and specific language in both the state statutes and the regulations to the effect that the land will be used for the direct, immediate, and exclusive benefit of the subdivision involved. The present statute is deficient in both these respects. If these suggestions are carried out, such an exaction would face the constitutional problems which apply to dedication of land. It has been seen that fees for park and playground use within the subdivision would have a better chance of being upheld than would fees for school sites.

CONCLUSIONS

As reflected in the four counties considered, the current state of Maryland subdivision regulations as they apply to open spaces indicates that the planning commissions have been influenced far more by the concepts of city planners than by judicial thinking. While municipalities must conceive of new regulations to meet changing circumstances, they must, at the same time, conform to proper procedural requirements and must be content to place on the subdivider only those requirements which are deemed to be constitutional.

It is a truism that the courts do not look upon the requirements for land for parks, playgrounds, and schools with the same favor as when they judge the constitutionality of improvements such as streets, gutters, sewers, and sidewalks. This is not to say that the courts are unsympathetic with the problems of subdivision controls. But it is to say that if there is to be any hope for legitimate control over the preservation of open spaces in new subdivisions, the demands placed on the subdivider and passed on to the new residents must conform to judicial pronouncements. Just because the subdivision regulations enforced by the municipalities of Maryland have not been challenged, does not mean that the statutes and local regulations should not be reexamined in an attempt to bring them into line with court decisions.